Supreme Court
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No. 98-1007

In The

Supreme Court of the United States

October Term, 1998

CRAIG P. WALLIN,

Petitioner,

v.

MINNESOTA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was it proper to enforce a settlement and release which Petitioner Craig P. Wallin ("Wallin") agreed to, signed, and could have rescinded regardless of his union's wishes?

2. Was Respondent Minnesota Department of Corrections ("DOC") properly granted summary judgment on Wallin's Americans With Disabilities Act claim, where Wallin failed to show that his discharge from employment was due to disability discrimination, and where he failed to show that he was subjected to a severely and pervasively hostile environment due to any disability?

3. Was Wallin deprived of any liberty interests in an allegedly stigmatizing letter, when it is undisputed that Wallin was given a *Loudermill* hearing on the discharge letter, which was followed by an arbitration on the reasons for the letter, resulting in a suspension being imposed through the letter instead of a discharge?

4. Was Wallin accorded sufficient due process of law when suspended without pay for five days pending investigation without a pre-suspension *Loudermill* hearing before the suspension, where the union contract governing his employment relationship specifically provided for such procedure, when the suspension was over a possible breach of security at a close security prison, and when Wallin was accorded ample post-suspension due process opportunities to contest the suspension?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Minnesota Department of Corrections, Dennis Benson, David Corbo, and Elizabeth Hughes (f/k/a Elizabeth A. Binkley) respectfully request that this Court deny the Petition for a Writ of Certiorari (hereinafter "Petition" or "Pet.") seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINONS BELOW

The opinion of the Eighth Circuit is reported at 153 F.3d 681 (8th Cir. 1998) and is reprinted in the Appendix to the Petition (hereinafter "Pet. App at ___") at pages 2a-21a. The opinion of the District Court is reported at 975 F. Supp. 1234 (D. Minn. 1997) and is reprinted in the Pet. App. at 29a-52a. The opinion of the District Court finding Petitioner's litigation of the efficacy of the Settlement and Release he signed to be frivolous is not reported, but is reprinted at Pet. App. at 22a-28a.

STATEMENT OF THE CASE

This case arises out of Petitioner Craig P. Wallin's ("Wallin") employment with Respondent Minnesota Department of Corrections ("DOC") at DOC's Close Security Correctional Facility (prison) at Stillwater, Minnesota ("MCF-STW"). The case also involves Wallin's interaction with several DOC employees, to wit: Respondents Dennis Benson ("Benson"), the Warden at MCF-STW at the time

that most of the actions giving rise to this lawsuit arose; David Corbo ("Corbo"), the Director of Human Resources at MCF-STW at the time most of these actions arose; Elizabeth Hughes (formerly Elizabeth A. Binkley) ("Hughes"),[1] a Corrections Officer who worked with Wallin at certain times at MCF-STW;[2] and Terry Bath ("Bath"), another Corrections Officer working with Wallin at certain times at MCF-STW.[3]

I. Facts Regarding Wallin's Discharges From Employment.

Wallin began working at MCF-STW as a Corrections Officer in 1980. He progressed from a Corrections Officer I to a Corrections Officer III by 1985.

In March, 1992, Wallin assaulted his live-in girlfriend. Joint Appendix at pp. 2148-69, 74-75.[4] Wallin had been previously convicted of criminal misdemeanor assaulted against the girlfriend in 1991. A: 2156; Wallin Depo. at 10-12, A: 70.

Wallin was charged with gross misdemeanor assault for the March 192 assault. While this charge was pending,

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[1] In both the caption at the District court, the Eighth Circuit, and before this Court, Hughes is referred to by her former name of Elizabeth A. Binkley.

[2] DOC, Benson, Corbo, and Hughes are collectively referred to as "Respondents." This term does not include Respondent Terry Bath ("Bath"), who is separately represented.

[3] Bath is separately represented by Assistant Attorney General Margie Hendricksen.

[4] The citations to the Joint Appendix will be identified as follows: "A: ___."

Wallin entered a chemical dependency treatment program for alcohol abuse and then returned to work on the condition he remain chemical free for about three years. Wallin Depo. at 235-36, A: 126-27; and at A: 253-54.

As a result of the March 1992 assault, Wallin pleaded guilty to gross misdemeanor assault, and was sentenced to fifteen days in jail. A: 2167. MCF-STW, through then Warden Robert A. Erickson, issued a discharge letter to Wallin, stating, in part, that Wallin's criminal conviction sent the wrong message to his fellow employees and to inmates. A: 2176-79.

Wallin was given an opportunity to have a *Loudermill*[5] hearing before he was discharged. A: 2180. After providing Wallin with this opportunity, Warden Erickson decided to discharge Wallin.

Wallin was represented by the American Federation of State, County, and Municipal Employees, Council 6 ("AFSCME"), a union for, among others, State of Minnesota employees. Wallin grieved the 1992 discharge through AFSCME, and pursuant to the collective bargaining agreement. A: 2189-90; A: 2194.

Wallin's discharge grievance was settled. Wallin was reinstated to employment with MCF-STW, but was demoted from Corrections Officer III to Corrections Officer II. However, he continued to receive the same salary as a Corrections Officer III. *Id.* The settlement terms provide, in part, that:

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[5] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

This Settlement and Release is made and entered into this 11th day of December, 1992, by and between the State of Minnesota, Department of Corrections, MCF-Stillwater (hereinafter "Employer") and AFSCME, Council 6 (hereinafter "Union") to resolve the grievance of Mr. Craig Wallin, (hereinafter Grievant), Employer Case No. 93-207, Union Case No. 92M-16-600-6672.

* * *

7. The parties agree that this Settlement and Release is made for the purpose of releasing and discharging each other (including their employees, agents, officers and officials jointly and severally, individually and in their official capacities) by compromising and finally settling all claims, differences, grievances and causes of action against the above-noted parties based on any and all acts or omissions allegedly committed by them, including but not limited to, claims based upon contract, employment agreement, violation of statutory law, violation of civil or constitutional right, or tortuous conduct arising from *or in any way connected with the parties' employment relationships, up to and including the date of this Settlement and Release.*

8. *This Settlement and Release waives or releases rights or remedies provided under Minnesota Statutes, Chapter 363, the Human Rights Act. This document constitutes written notice to the signatory party of the right to rescind this waiver or release within 15 calendar days of its execution by all parties.* To be effective, the rescission must be placed in writing and be

> delivered to the departmental representative signing below either by hand or may within the 15 calendar day period. * * *
>
> *If a party signing below elects to rescind or files a human rights charge during the 15 calendar day period, the other party may elect to restate the entire Settlement and Release as null and void.*

A: 25-26 (emphasis added.)

The document was singed by representatives of AFSCME and of DOC. Wallin also singed the Settlement and Release, stating "I understand and voluntarily accept the terms of this Settlement and Release." In his deposition, Wallin testified that the Settlement and Release was agreed to by him. Wallin Depo. at pp. 318-20, A: 147-48. Sid Helseth, the person signing the Settlement Agreement on behalf of AFSCME, has stated that the agreement was between AFSCME and DOC. Deposition of Sid Helseth at pp. 9-10 ("Helseth Depo."), A: 611. He has also stated under oath that Wallin was a party to the agreement, and had authority to revoke the agreement. *Id.* at 12-13, 16, A: 611-12; and Exh. 1, A: 632; and at 90-91, Supplemental Appendix of Appellees at pp. 6-7.[6] Wallin's attorney wrote a letter to Mr. Helseth supporting the position that Wallin was releasing claims under the Settlement Release. He commented on a draft of the Settlement and Release, telling Mr. Helseth, among other things, that:

> 7. *Finally, paragraph 6 of the Agreement regarding release of rights under the Minnesota Human*

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[6] Hereinafter, the Supplemental Appendix of Appellees will be referred to as: "Supp. App. ___."

> *Rights Act should include language clarifying that this only applies to acts or incidents arising prior to and up to the date of signing the Agreement. Mr. Wallin cannot release claims that may arise in the future.*
>
> *I think the Settlement Agreement and Release looks good with the exception of these changes and these really serve to safeguard Mr. Wallin's understanding of the terms.* These changes do no [sic] alter the basic terms of the Agreement.

A: 660-61 (emphasis added.)

As a result of the settlement, Wallin returned to work at MCF-STW on or about January 13, 1993. Wallin was later involved in several inappropriate actions.

On March 28, 1993, Wallin, in the presence of Corrections Officer Hans Meizinger, mistreated and belittled an inmate during a shakedown of the inmate's cell. Affidavit of Hans Meizinger, dated October 4, 1996 ("Meizinger Aff."), at Exh. A, A: 2340-42. Wallin provoked and harassed the inmate by having him step in and out of his cell several times, by yelling at him while standing next to him, and by prolonging the shakedown, which normally takes a short time, to over 25 minutes. *Id.* at Exh. B, p. 4, A: 2346. Even after the inmate became angry, Wallin continued to provoke him. When Wallin completed the shakedown, he was amused by his harassment, telling Meizinger "that's how a shakedown is done" and "he'll learn the rules, that will teach him." *Id.* at Exh. A, p. 3, A: 2342. Wallin was smiling when he made these comments. *Id.* Immediately after the harassing treatment, the inmate became extremely angry and frustrated, throwing

a chair against his cell door. Meizinger Aff. at Exh. B, p. 6, A: 2348. Wallin was interviewed about this incident and denied harassment, stating that he could not remember certain events, or that he was acting in the normal performance of his duties. Affidavit of James Crawford, dated October 3, 1996 ("Crawford Aff."), at Exh. B, pp. 1-11, A: 2265-75. During his deposition, Wallin admitted that he had belittled the inmate. Wallin Depo. at 269-70, A: 135.

On April 3, 1993, Wallin created a breach of security in Cell Hall D by deliberately placing cells on key lock. Dodge Aff. at p. 3, ¶ 11, A: 2218; Wallin Depo. at 252-54, A: 131. Wallin stated that this action was intended as a learning experience for a new officer in the work unit, yet Wallin never asked for or received permission from his superiors to conduct such an action. Wallin Depo. at 253, A: 131. Wallin admitted to causing the breach of security. Wallin Depo. at 252, A: 131.

On April 20, 1993, Wallin was involved in an incident with Respondent Hughes. During this incident, Wallin demonstrated inappropriate behavior by shouting at Hughes, using berating language, and approaching her in a threatening and intimidating manner. Hughes Aff. at pp. 1-2, ¶ 1, Supp. App. 8-9; and at Exhs. A and B, Supp. App. 11-28. When questioned about this incident, Wallin's answers were vague and evasive, including responses such as "I don't remember." Crawford Aff. at Exh. B, pp. 12-25, A: 2276-89.

The behavior described above precipitated investigations by DOC. Crawford Aff. at Exh. C, A: 2290-2337; Affidavit of Virginia LeVasserur, dated October 10, 1996

("LeVasseur Aff.") at pp. 1-2, ¶¶ 1-3, A: 2240-41; Second Affidavit of David Wilmes, dated October 4, 1996 ("2nd Wilmes Aff."), at Exh. B, A: 2370-2400. Investigator Crawford had initially been assigned to investigate the incident involving Wallin and the inmate. Investigator Wilmes investigated the incident involving Wallin and Hughes because it raised security concerns.

On or about April 22, 1993, Wallin was placed on investigatory suspension, 3rd Benson Aff. at p. 2, ¶ 5, A: 2414, and Exh. C, Supp. App. 30, without pay for five (5) days, because of concerns involving the incidents regarding Hughes and inmate Pickar. The AFSCME CBA specifically entitled Benson to place Wallin on investigatory suspension without pay, in order to protect the security of the prison, and thereby protect the public safety. 3rd Benson Aff. at Exh. A, p. 48; Supp. App. 32.

After the investigations, Benson tentatively decided to discharge Wallin. Second Affidavit of Dennis Benson, dated October 8, 1996 ("2nd Benson Aff. at ___"), at p. 2, ¶ 4, Supp. App. 35. The reasons stated in the discharge letter were based on the facts shown in the investigatory reports and statements. 2nd Benson Aff. at pp. 2-3, ¶ 8, Supp. App. 35-36. Wallin was given a *Loudermill* hearing, or opportunity to be heard at the time of his second discharge. *Id.* at ¶ 9, Supp. App. 36. Wallin did not ask for any reasonable accommodation of any disability at his *Loudermill* hearing. *Id.*; Wallin Depo. at p. 134, A: 101.

Finding a pattern of misconduct and no justification for the behavior during the *Loudermill* hearing, Benson proceeded with the discharge. Third Affidavit of Dennis Benson, dated May 2, 1997 ("3rd Benson Aff. at ___") at

pp. 1-2, ¶ 2, A: 2413-14. In discharging Wallin, Benson acted, among other reasons, to protect MCF-STW employees from further harassment, and to protect the public safety. 2nd Benson Aff. at p. 2, ¶ 7; Supp. App. 35.

Wallin grieved his second discharged through AFSCME, with the grievance eventually being arbitrated. The arbitrator did not affirm the discharge, noting that he did not find that Hughes had been harassed, but he did say that Wallin's period of unemployment from the time of his discharge, April 30, 1993, through the time of his reinstatement, May 1994, would be recorded as a disciplinary suspension without pay. S-J Corbo Aff. at Exh. I, p. 11, A: 2210. The disciplinary letter of April 30, 1993, was then amended to read that Wallin was being given a suspension instead of a discharge. *See* Pet. App. at 18a.

II. Facts Regarding Alleged Harassment Against Wallin.

On or about January 13 or 14 of 1993, when Wallin returned to work at MCF-STW, Bath, a Corrections Officer III (sergeant), was the lead worker for the area of MCF-STW in which Wallin was assigned. Bath told Corrections Officer Steve Summers to provide training to Wallin. According to Wallin, Summers said that he would provide training to Wallin, but did not want to do so. No reference to Wallin being disabled was made during the exchange. 3rd Wallin Depo. at 131, A: 193.

On or about January 31, 1993, Bath stated to Corrections Officer Ron Jansen, in Wallin's presence, that it was just like these "alcoholic fuckers" to go to treatment, jail and then be allowed back to MCF-STW. Wallin filed a

harassment complaint about this comment, which DOC investigated. Affidavit of Fredric Hillengass dated May 2, 1997 ("Hillengass Aff."), at p. 1, ¶ 2, A: 2418. The comment was substantiated in part. DOC therefore warned Bath about the remark. *Id.* Bath also apologized to Wallin for the remark. Hillengass Aff. at p. 2, ¶ 3, A: 2419.

On or about April 3, 1993, Wallin was working Cell Hall D at MCF-STW, and asked for an early out of work. Bath, the Watch Sergeant assigned to take down the names of persons requesting early outs, said there would be no early outs because there were not enough additional officers on duty to allow early outs. *Id.* at Exh. B, A: 2433-37. While Wallin disagreed with that assessment, he did not claim that Bath made any disparaging remarks to him in denying the early out. 3rd Wallin Depo. at 159, A: 200. Wallin suffered no injury from this event. *Id.* at 160, A: 200. On a day that he necessarily had to plan to work eight hours, Wallin was denied the opportunity to take two hours of vacation leave.

Nevertheless, DOC investigated the incident, and determined there was no basis for finding that Bath harassed Wallin or acted inappropriately towards him. Hillengass Aff. at Exh. B; A: 2433-2437.

Wallin also claims that Bath harassed him in 1994, outside the time period for which he obtained a right to sue letter from United States Equal Opportunity Commission ("EEOC"), by pushing a laundry cart into Wallin, and then, remarking to Wallin about moving his fat ass out of the way. Bath claimed that he did not see Wallin when he was pushing the cart and it struck Wallin. DOC, through LeVasseur, investigated the incident and found it

to be an accident, not an intentional act. No action was therefore taken against Bath.

REASONS FOR DENYING THE PETITION

The reasons for denying the Petition, while explained below with regard to each individual issue raised by Wallin, can be summed up in one statement: In granting summary judgment and enforcing the release, the District Court and the Eighth Circuit followed established case law and undisputed facts; hence there is nothing novel or otherwise precedent setting in this grant of summary judgment.

For example, first, the District Court enforced a settlement agreement release agreed to and signed by Wallin, DOC, and Wallin's union, AFSCME, releasing any liabilities incurred before December 11, 1992. The trial court also awarded DOC, Benson, Corbo, and Hughes their attorney's fees for having to enforce the release, where Wallin testified that *the release was agreed to by him and where Wallin's attorney, Stephen C. Fiebiger, provided advice to AFSCME on how to release Wallin's claims.* In this situation, Wallin can point to no Supreme Court cases conflicting with the present case. He can point to no circuit cases from other circuits conflicting with the present case. Given Wallin's individual control over the Settlement and Release, Wallin cannot point to the Eighth Circuit decision as being of such great importance that it must be heard by this Court. Finally, as the analysis below shows, he cannot point to the decision as being wrong.

Second, Wallin's principal claim is that, in violation of the Americans With Disabilities Act ("ADA"), DOC discriminated against him by discharging him because of his disabilities of depression and alcoholism and by knowingly allowing him to work in an environment hostile to the disabled. This claim, broken down into a "discharge theory" and "harassment theory," fails because the undisputed facts show that Wallin was not discharged "because of" any actual or perceived disabilities, and that he was not subjected to a severe and pervasively hostile work environment. On this claim, Wallin has not pointed to any Supreme Court or circuit court cases conflicting with the present case. He cannot show that a lack of evidence showing disability discrimination means that the summary judgment was wrong. With regard to harassment, the Eighth Circuit's decision adheres closely to recent Supreme Court rulings on harassment and hostile work environment. *See e.g., Faragher v. City of Boca Raton*, 524 U.S. ___, 118 S. Ct. 2275, 2283 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. ___, 118 S. Ct. 998, 1003 (1998). Hence, not only is Wallin unable to show a conflict in authorities, the Eighth Circuit's decision, because it follows Supreme Court recent precedents, is not of such grave importance that it deserves Supreme Court review.

Third, Wallin's allegations that his "liberty interests" were violated in having his April 30, 1993, discharge letter changed to a suspension letter after arbitration is meritless. Wallin received a *Loudermill* hearing on the discharge letter when it was first issued on April 30, 1993. Further, when it was changed to a suspension letter in May 1994, it was not done in the context of a discharge,

but a suspension. The Eighth Circuit's decision on this point follows the traditional analysis of not allowing a liberty interest claim, where there has been a pre-deprivation hearing. Thus Wallin is unable to show a break from the precedent of this Court or other circuit courts. Further, given the fact that the alleged deprivation of a liberty interest took place over the suspension that followed the discharge, the issue raised by Wallin, and its precedential impact on other cases, is not of such grave importance as to justify Supreme Court review.

Finally, Wallin alleges that his due process rights under 42 U.S.C § 1983 were violated by being investigatorily suspended on April 22, 1993, without a pre-suspension *Loudermill* hearing. This argument fails because Wallin had no "property interest" in the five (5) day investigatory suspension; assuming *arguendo* that such a property interest exists, it was *de minimis;* Wallin's need for a pre-suspension *Loudermill* type hearing before being investigatorily suspended was far outweighed by DOC's and Benson's need to rapidly remove him from MCF-STW as a potential security threat in a close security prison; and, the need for an opportunity to be heard was ameliorated by the post-suspension due process Wallin had available to him (such as arbitration), which he in fact used.

In finding no deprivation of a property interest, the Eighth Circuit again followed this Court's recent rulings directly on the subject. *See Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807 (1997). Hence the Eighth Circuit's decision does not conflict with any precedents from this Court, or with other circuit court decisions decided after the Supreme Court's recent decision in *Homar*. The five (5)

day investigatory suspension does not, therefore, present any issues of such grave importance, so as to justify Supreme Court review.

I. CONSISTENT WITH ESTABLISHED LAW AND UNDISPUTED FACTS, THE DISTRICT COURT AND THE EIGHTH CIRCUIT ENFORCED A SETTLEMENT AND RELEASE THAT WAS PERSONALLY AGREED TO BY WALLIN.

The entire thrust of Wallin's argument is that his constitutional rights and statutory rights, such as his rights under the ADA, were negotiated away by his union, AFSCME, without his approval, thereby creating an issue as to whether a union, such as AFSCME, can release claims based on its authority to prosecute grievances.

The argument fails because the undisputed facts show Wallin and his attorney, Mr. Fiebiger, personally involved in negotiating a settlement that involves Wallin personally releasing statutory claims.

The fact that this was an agreement releasing Wallin's claims is made clear by his voluntary acceptance of the terms, by the language of the agreement, and by attorney Fiebiger's letter stating that the agreement was releasing rights of Wallin. For example, the language talks about waiving rights under the Minnesota Human Rights Act ("MHRA"). These are rights that were personal to Wallin, and not to AFSCME, as Wallin's attorney, Mr. Fiebiger, specifically alluded to in discussing the fifteen day rescission period. A: 660-61. Further, it is undisputed that Wallin – *without any need for approval from AFSCME* –

could have rescinded the entire agreement, including the release of constitutional, statutory, and tort claims. *See* Minn. Stat. § 363.031, subd. 2 (1998) (providing a fifteen (15) day period for rescission of agreements waiving MHRA claims).

Wallin's independent control over the Settlement and Release is of critical importance, because it makes clear that he was not forced by his union, AFSCME, to accept a settlement that was unacceptable to him. In *Alexander v. Gardner-Denver*, 415 U.S. 36, 58, including at n.19 (1974), this Court expressed its concern about the statutory rights of individual employees being subject to resolution in the employer/employee process of collective bargaining, and grievance including arbitration. This Court was concerned, *inter alia*, that unions representing employees over a statutory claim such as Title VII race discrimination, might not represent the employee with the vigor and zealousness to which the employee was entitled, and would have received if the claim was litigated in court by the employee personally. In other words, this Court was concerned that individual statutory rights would be given short shrift by collective bargaining units like AFSCME.

The present case presents a stark contrast to that situation. The undisputed evidence shows Wallin in *independent* control of whether to agree to the Settlement and Release. If he thought that his rights were being cavalierly or otherwise improperly bargained away by AFSCME, he had the authority to nullify the Settlement and Release. Hence the danger of Wallin's statutory rights being given short shrift by AFSCME was not present. Therefore, consistent with recent Congressional

enactments in the Civil Rights Act of 1991 and the ADA, *see* Pub. Law No. 102-166, § 118, 105 Stat. 1071, 1081 and 42 U.S.C. § 12212, about alternative dispute resolutions like settlement negotiations being encouraged as a method for resolving disputes over statutory rights, AFSCME, DOC, and Wallin were entitled to negotiate and reach an agreement to resolve all aspects of their employment dispute.[7] Nothing this Court has decided indicates that such a ruling, rooted firmly in Wallin's individual right to choose to settle under these terms, is of such grave importance that this Court should review this part of the decision.

II. NEITHER THE DISTRICT COURT GRANTING DOC SUMMARY JUDGMENT ON WALLIN'S ADA CLAIMS, NOR THE EIGHTH CIRCUIT IN REVIEWING THE GRANT OF SUMMARY JUDGMENT DEPARTED FROM WELL ESTABLISHED PRINCIPLES OF SUMMARY JUDGMENT JURISPRUDENCE.

To survive summary judgment on his ADA claim, Wallin had to establish genuine issues of material fact on the following points: 1) that he had a disability as defined

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[7] Further, in doing so, no new precedent was made on the issue of whether unions enforcing collective bargaining agreements may bargain away or otherwise represent individual employees over statutory claims, because, again, Wallin could exercise independent control to rescind the agreement, including the release. *See Wright v. Universal Marine Corp.*, ___ U.S. ___, 119 S. Ct. 391 (1998) (acknowledging but not deciding upon the tension between the resolution of statutory claims in management/labor processes such as arbitration and, alternatively, the resolution of such claims in the courts).

in 42 U.S.C. § 12102(2); 2) that he was qualified to perform the essential functions of the job, with or without reasonable accommodation; and 3) that he suffered adverse employment action *because of* his disability. *See Benson v. Northwest Airlines*, 62 F.3d 1108, 1112 (8th Cir. 1995) (emphasis added).

Wallin's ADA claim is essentially divided into two theories of liability.[8] First, according to Wallin, DOC violated the ADA by discharging Wallin from employment on April 30, 1993 ("discharge theory") due to a disability. Second, DOC allegedly violated the ADA by allowing Wallin to be harassed at work, such harassment constituting disability discrimination ("harassment theory").

With regard to discharge, Wallin admitted to belittling the inmate. Wallin Depo. at pp. 269-70, A: 135. Wallin admitted to engaging in a deliberate breach of security, Wallin Depo. at p. 252, A: 131; Exh. 28, A: 371, and admitted it was an intentional, wrongful act, Wallin Depo. at p. 254, A: 131. As the Eighth Circuit found, these facts show that Wallin was not discharged because of a particular disability; he was discharged for misconduct. *See* Pet. App. at 11a. In response, as the Eighth Circuit found, Wallin cannot point to any facts which show that he was discharged "because of" a disability. *See* Pet. App. at 10a (Eighth Circuit Opinion) (citing *Furnco v. Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978) (Title VII) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)). Hence, the District Court and the Eighth Circuit did not

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[8] Wallin had argued retaliation under the ADA to the lower courts, but does not appear to do so here.

depart from established summary judgment jurisprudence in finding that there were no genuine issues of material fact on Wallin's ADA discharge theory; further, they properly determined that DOC was entitled to summary judgment as a matter of law.

Wallin's next theory of liability is that, analogizing to sex harassment constituting sex discrimination under Title VII, *see Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), Wallin was subjected to a hostile work environment due to a disability, and hence was subjected to disability discrimination under the ADA. *See* Pet. at pp. 20-21.

The problem with this argument is that, consistent with *Faragher v. City of Boca Raton*, 524 U.S. ___, 118 S. Ct. 2275, 2283 (1998), the Eighth Circuit determined that, if a disability-harassment cause of action does exist,[9] it must be so sever, so hostile, so pervasive, that it creates an abusive work environment. *See* Pet. App. at 12a-13a. An environment that is not pervasively hostile, that has stray, boorish remarks, does not give rise to a hostile environment claim. *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. ___, 118 S. Ct. 998, 1003 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993).

The Eighth Circuit followed these case precedents, evaluated each of the acts of alleged abuse, and found,

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[9] The Eighth Circuit initially observed that a hostile environment theory for violating the ADA had not been recognized. *See* Pet. App. at 12a. Nevertheless, in an abundance of caution, the Eighth Circuit then proceeded to analyze Wallin's hostile environment ADA claim under similar Title VII provisions. *See* Pet. App. at 12a-13a.

viewing them in the light most favorable to Wallin, that they did not show a severe and pervasively hostile work environment due to any disability. *See* Pet. App. at 13a. Hence, far from departing from established discrimination and summary judgment jurisprudence, the Eighth Circuit followed recent rulings of this Court, *see* Pet App. at 12a-13a, and correctly determined that DOC was entitled to summary judgment on Wallin's harassment theory under the ADA. The Eighth Circuit's decision on the ADA claim, then, does not break with established precedent nor present this Court with an issue of such grave importance that it should grant certiorari.

III. UNDER ESTABLISHED CASE LAW, WALLIN WAS NOT DEPRIVED OF ANY LIBERTY INTERESTS DUE TO ALLEGEDLY STIGMATIZING STATEMENTS BECAUSE HE RECEIVED A *LOUDERMILL* HEARING BEFORE THE DISCHARGE LETTER TOOK EFFECT, AND AN ARBITRATION AFTER IT TOOK EFFECT, WHICH RESULTED IN THE LETTER ONLY IMPOSING A SUSPENSION.

Wallin claims that he was deprived of a liberty interest in having his April 30, 1993, discharge letter changed to a suspension letter, after an arbitrator changed his discharge to a suspension. *See* Pet. at pp. 22-24. The argument fails for at least two reasons.

First, a section 1983 liberty interest is violated when, acting under color of state law, a person falsely disparages and stigmatizes another person, without the stigmatized person having notice of the disparaging or stigmatizing remarks and also not having an opportunity

to be heard with regard to such remarks. *See Board of Regents v. Roth*, 408 U.S. 564, 572-733 (1972). Mere publication of a false stigmatizing reason for discharge, intentional or otherwise, is not actionable under section 1983 unless the injured party was denied the opportunity to refute the charge. *See id.*, 408 U.S. at 573. It is the denial of due process, not the defamation *per se*, which triggers a federal cause of action. *See Paul v. Davis*, 424 U.S. 693, 709-12 (1976).

In the present case, Wallin was given a *Loudermill* hearing at the time of his April 30, 1993, discharge. His reasons for disputing the discharge were deemed insufficient. Wallin then grieved this discharge through the grievance process. He was given an opportunity to be heard, and did have his position presented at his arbitration hearing on March 9, 1994. For example, Wallin had the opportunity to challenge Benson's discharge letter and the March 1994, arbitration hearing on his discharge, and did, through his union, AFSCME. Hence there was due process regarding the allegation made in the April 30, 1993, letter.

Second, as the Eighth Circuit found, it is undisputed that when the April 30, 1993, discharge letter was changed into a suspension letter in May 1994, it was done in conjunction with a suspension, not a termination. Hence it did not implicate a liberty interest. *See* Pet. App. at 18a, fn. 9 (Eighth Circuit Opinion) (citing *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 630 (2d Cir. 1996) ("a defamatory statement about an employee implicates a liberty interest when it is made during the course of that employee's termination from employment"), *cert. denied*, 117 S. Ct. 1083 (1997)). *Donato*

cited, among other cases, *Paul*, 424 U.S. at 709-10, to buttress this conclusion.

It is therefore clear that the Eighth Circuit properly granted summary judgment on Wallin's section 1983 liberty interest claim, and, in so doing, did not depart from Supreme Court established principles of law in the area. Thus, Wallin's "liberty interest" claim does not create a basis for granting review.

IV. CONSISTENT WITH CASE LAW ON DUE PROCESS, WALLIN WAS NOT DEPRIVED OF DUE PROCESS WITH REGARD TO THE APRIL 22, 1993, INVESTIGATORY SUSPENSION.

Wallin's argument that this Court should grant certiorari regarding the five day investigatory suspension, *see* Pet. at pp. 16-19, is belied by the fact that this Court has recently dealt with this issue in *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807 (1997), by the fact that the suspension in the present case was only five days, or substantially shorter than the one dealt with in *Homar*, and by the fact that Benson's concern over security was a legitimate reason under current due process jurisprudence for not conducting a *Loudermill* hearing over the suspension.

The AFSCME CBA specifically provided that, on a reasonable basis, employees like Wallin cold be suspended *without* pay for up to five days. Supp. App. 32 (p. 48). No just cause standards applied to such suspensions. Hence, in the words of *Roth*, Wallin had no legitimate claim of entitlement to the contrary. He therefore

had no property interest requiring a *Loudermill* type hearing before imposing the suspension. Put another way, the suspension was analogous to the termination of an at-will employee, who similarly is not entitled to hearing before termination of employment. Hence, no due process right was violated.

Assuming *arguendo,* that the "reasonable basis" language created a protected property interest regarding the suspension, he was accorded all the process due, given the serious nature of the allegations against him. He was suspended after he belittled an inmate, caused a breach in security and allegedly harassed Hughes. Benson and DOC had a strong interest in removing Wallin from the dangerous business of prison security until an investigation of these claims was completed and reviewed. A: 2414, ¶ 5. To do otherwise might have subjected inmates, employees, and the public to further, unjustified security risks. Balancing these serious concerns against the short period of time for the investigatory suspension, and Wallin's post-suspension remedies, such as grievance and arbitration, which Wallin ended up using with regard to his subsequent termination on April 30, 1993, for these same issues, the Eighth Circuit, relying on *Homar,* 117 S. Ct. at 1813, was correct in granting summary judgment on the section 1983 due process claim.[10] *See* Pet. App. at 19a, 20a-21a. Hence Wallin's request for certiorari on this issue should also be denied.

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[10] The AFSCME CBA specifically provided for restoration of pay if no discipline followed the suspension, and grievance if discipline did follow. Supp. App. 32 (p. 48).

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

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Respectfully submitted,

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